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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

STUDENT, a Minor by and through her Guardian Ad Litem, Plaintiff(s), vs. MANHATTAN BEACH UNIFIED SCHOOL DISTRICT, Defendant(s).	2:07-cv-7333 FMC-CWx **ORDER AFFIRMING THE OFFICE OF ADMINISTRATIVE HEARINGS' DECISION**

Plaintiff Student appeals from the Order of the Office of Administrative Hearings ("OAH") entered July 31, 2007. The Court has read and considered Plaintiff's and Defendant's Opening Briefs, and Plaintiff's and Defendant's Reply papers. For the reasons and in the manner set forth below, the Court hereby **AFFIRMS** the OAH decision.

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FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Plaintiff ("Student") is a young girl who lives with both her parents in Defendant school district's ("District") geographical boundaries. (Admin. R. ("AR") 282 ¶ 1.) In November of 2001, when Student was three years old, District conducted an initial assessment of Student and determined she was speech and language impaired and eligible for special education and related services. (AR 283 ¶ 1.)

In October of 2004, District conducted a mandatory triennial speech and language assessment to reassess Student's continued eligibility for special education. (AR 891-93; 283 ¶ 1.) The assessment revealed Student's below-average ability in receptive and expressive language skills, and it recommended continued speech and language services. *Id.* The October 2004 assessment was District's last assessment of Plaintiff. (AR 283 ¶ 1.)

On October 9, 2006, District held Student's Individualized Education Program ("IEP") team meeting. (AR 283 ¶ 3; 938-47.) At the time, Student was eight years old and attending second grade in one of District's elementary schools. (AR 283 ¶ 1.) Student's parents ("Parents") were notified of this meeting and Student's father ("Father") attended. (AR 283 ¶ 3; 843:4-11.) Nancy Doyle, Principal and District's administrative designee; Lynn McIver, Student's second grade general education teacher; and Dana Briggeman, Student's speech and language pathologist and District's special education designee, were also in attendance. (AR 283 ¶ 3; 422:7-9; 558:3-7; 946.)

At the meeting, Ms. McIver discussed Student's classroom progress, which included concerns over Student's slow reading fluency, difficulty comprehending classroom material, and need for frequent reminders to remain on task. (AR 283 ¶ 4; 945.) Father informed the IEP team of Student's poor spelling performance despite studying at home with Parents. *Id.* The IEP team also discussed Student's speech and language goals and other strategies to improve comprehension. (AR 285

¶ 9-10; 945.) Despite Ms. McIver's one-on-one instruction, Student continued to struggle academically and socially. (AR 284 ¶ 5-6; 456:11-458:12) Because of Student's deficient performance for her age, the team recommended a reassessment one year earlier than the triennial assessment scheduled for October 2007. (AR 285 ¶ 9-11; 945.) One week later, on October 16, 2006, District provided Father with an assessment plan listing the proposed tests to be conducted on Student. (AR 286 ¶ 13; 890.) On that same day, Father gave his consent to the assessment plan by signing it. *Id.*

Soon after Father signed the assessment, Sandra Ottoway, District's school psychologist, began the assessment. (AR 286 ¶ 14; 625:16-626:25.) Ms. Ottoway removed Student from her physical education class in order to assess her. (AR 286 ¶ 14; 732:1-21.) In the following months, Parents and District exchanged a series of oral and written communications, "clearly strain[ing]" their relationship.[1] (AR 287 ¶ 16-20; 948-54.) During this time, Student's mother ("Mother") requested Student not be taken out of physical education nor left alone with any male, and District accommodated those requests. (AR 287 ¶ 16; 906.) Parents also revoked their consent to the assessment, and eventually to all special education services, with which District complied by suspending the services. (AR 287 ¶ 18, 290 ¶ 29; 898, 904-09.) However, District frustrated Mother's attempts to meet with Ms. McIver individually, pressing for an IEP meeting instead. (AR 287 ¶ 20; 951-62.)

The IEP team met again on January 11, 2007, at the exit IEP meeting to discuss Student's removal from special education services. (AR 288 ¶ 21, 289 ¶ 28; 966-67.) Both Parents and their advocate were in attendance, along with Principal

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[1] The deterioration of Parents' and District's relationship might also be attributable to Parents' successful Compliance Complaint to the California Department of Education ("CDE") about District's failure to provide speech and language services during the 2004-2005 and 2005-2006 school years. (AR 287 n. 7; 912-37.)

Doyle; Ms. McIver; Ms. Briggeman; Ms. Ottoway; Dana Croatt, District's special education teacher; and Ellyn Schneider, District's Director of Special Education. (AR 289 ¶ 28; 967.) District raised its continued concerns over Student's academic difficulties and the need to reassess Student. (AR 966.) The advocate expressed Parents' dissatisfaction and their wish to remove Student from special education services. *Id.* District had also previously notified Parents that it was required to conduct an assessment before removing Student from special education services. (AR 897.) District provided Parents with another assessment plan dated January 22, 2007, which was virtually identical to the October 16, 2006 assessment plan. (AR 288 ¶ 22; 889-90.) Parents requested and received additional details on the assessment, but they ultimately did not consent to District's assessment. (AR 895.) Instead, they hired their own professional, Dr. Nancy Harjani-Muirhead, for an assessment. (AR 894.)

On March 13, 2007, District filed a request for a due process hearing before the OAH, Special Education Division. (AR 281.) On July 31, 2007, Administrative Law Judge ("ALJ") Eileen M. Cohn issued a decision finding District prevailed on the two issues presented: (1) whether District was entitled to conduct a reassessment of Student pursuant to its January 22, 2007 assessment plan over Parents' objection, and (2) whether District offered Student a free and appropriate public education ("FAPE") in the October 9, 2006 IEP. (AR 282, 299.) Student appealed the ALJ's decision by filing a lawsuit against District in Los Angeles Superior Court on September 27, 2007. On November 11, 2007, the case was removed to this Court.

STANDARD OF LAW

Under the Individuals with Disabilities Education Act ("IDEA"), any party aggrieved by the findings and decision made in a state administrative due process hearing "shall have the right to bring a civil action with respect to the complaint ... in a district court of the United States, without regard to the amount in controversy." 20 U.S.C. § 1415(i)(2)(A). The complaint may concern "any matter relating to the

identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." 20 U.S.C. § 1415(b)(6)(A). In reviewing the complaint, the court shall receive the state administrative proceedings' records, hear additional evidence at a party's request, and grant appropriate relief based on the preponderance of the evidence. 20 U.S.C. § 1415(i)(2)(C)(i)-(iii). Although the court has discretion as to what additional evidence will be considered, the court "must be careful not to allow such evidence to change the character of the hearing from one of review to a trial *de novo*." *Ojai Unified Sch. Dist. v. Jackson*, 4 F.3d 1467, 1473 (9th Cir. 1993).

I. Standard of Review

Judicial review in IDEA decisions differs substantially from judicial review of other agency actions because the court is neither confined to the administrative record nor held to a highly deferential standard of review. *Id.* at 1471. However, the court must give "due weight" to judgments of education policy. *Gregory K. v. Longview Sch. Dist.*, 811 F.2d 1307, 1311 (9th Cir. 1987) (citing *Hendrick Hudson Dist. Bd. of Educ. v. Rowley* ("*Rowley*"), 458 U.S. 176, 206, 102 S. Ct. 3034, 3050, 73 L. Ed. 2d 690 (1982)). Courts have discretion over how much deference to give state educational agencies' decisions but may not "'substitute their own notions of sound educational policy for those of the school authorities which they review.'" *Id.* at 1311 (quoting *Wilson v. Marana Unified Sch. Dist.*, 735 F.2d 1178, 1183 (9th Cir. 1984) (citing *Rowley*, 458 U.S. at 206, 102 S. Ct. at 3051)). In addition, "substantial weight" is given when the decision evinces careful, impartial consideration of all the evidence and demonstrates sensitivity to the complexity of the issues presented. *County of San Diego v. Cal. Special Educ. Hearing Office*, 93 F.3d 1458, 1466 (9th Cir. 1996); *see also Capistrano Unified Sch. Dist. v. Wartenberg*, 59 F.3d 884, 891 (9th Cir. 1995) ("The amount of deference accorded the hearing officer's findings increases where they are 'thorough and careful.'"). In recognition of the expertise of the state agency, the court must carefully consider the findings and endeavor to

respond to the hearing officer's resolution of each material issue, but it is free to accept or reject the findings in part or in whole. *Gregory K.*, 811 F.2d at 1311 (quoting *Town of Burlington v. Dep't of Educ.*, 736 F.2d 773, 792 (1st Cir.1984), *aff'd*, 471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985)).

II. Burden of Proof

The party challenging the state administrative decision bears the burden of proof. *Clyde K. v. Puyallup Sch. Dist., No. 3*, 35 F.3d 1396, 1399 (9th Cir. 1994), *superseded by statute on other grounds*. Although the IDEA confers procedural safeguards to protect the substantive rights of parents, there is no clear statutory language which contradicts the general principle of allocating the burden of proof to the party bringing the lawsuit. *Id.* at 1399.

DISCUSSION

I. Whether District Offered a FAPE in the October 9, 2006 IEP

The court's inquiry in IDEA suits is twofold. "First, has the [school district] complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the [school district] has complied with the obligations imposed by Congress and the courts can require no more." *Rowley*, 458 U.S. at 206-207, 102 S. Ct. at 3051 (internal footnotes omitted); *accord Union Sch. Dist. v. Smith*, 15 F.3d 1519, 1524 (9th Cir. 1994).

A. Procedural Compliance

Student argues that there were several procedural defects in the October 9, 2006 IEP.

First, She contends that both parents were required to attend the meeting, but only Father was present. Student interprets 20 U.S.C. § 1414(d)(1)(B)(I), which defines the IEP team to include "the parents of a child with a disability," to require both parents at an IEP meeting. However, Section 1414(d)(1)(C), titled "IEP Team

Attendance," makes no specific requirement for both parents, and additionally requires only "the parent" and not "parents" in consenting to an IEP team member's absence. In addition, 34 C.F.R. § 300.322(a) requires a school district to take steps to ensure "one or both parents" attend an IEP meeting. Moreover, section 56341(b)(1) of the California Education Code requires "one or both parents" in an IEP team. Accordingly, the Court rejects Student's interpretation, which would require both parents at an IEP meeting.

Student also argues that the regular education teacher, Ms. McIver, left the IEP meeting early, without following the written procedure set forth in 20 U.S.C. § 1414(d)(1)(C)(ii)-(iii). The evidence clearly establishes that Ms. McIver was in attendance at the meeting and that she made significant contributions. However, the parties disagree as to whether she did in fact leave the meeting early. Whether Student meets her burden on this allegation is a moot point. Even assuming, arguendo, that Ms. McIver left early, this procedural defect does not necessarily preclude a finding of a FAPE. Procedural defects are fatal only if they impede a student's right to a FAPE, significantly impede the parents' opportunity to participate in the decisionmaking process of the student's FAPE, or cause a deprivation of educational benefits. 20 U.S.C. 1415(f)(3)(E); Cal. Educ. Code § 56505(j); *see also Amanda J. v. Clark County Sch. Dist.*, 267 F.3d 877, 892 (9th Cir. 2001). This alleged defect does not rise to the level of the enumerated substantive deficiencies.

Additionally, Student argues that there was no one present to explain or interpret the *proposed* evaluation of Student. Student fails to correctly cite any legal authority to support this argument. Section 1414(d)(1)(B)(v) and Section 56341(b)(5) require an individual who can interpret the evaluation *results* to attend, but that individual may also be one of the required IEP members, such as the regular education or special education teacher. Here, because there were no evaluation results to discuss at the IEP meeting, there was no need for an individual to interpret

evaluation results.

Finally, Student makes the general argument that Parents were denied significant participation. Parents play a "significant role" in the IEP process. *Schaffer v. Weast*, 546 U.S. 49, 53, 126 S. Ct. 528, 532 (2005). Parents are required members of the IEP team, § 1414(d)(1)(B)(i), and are guaranteed procedural safeguards, § 1415(a), to protect their rights. *See, e.g.*, 20 U.S.C. § 1415(b)(1) (parents may examine child's records and to obtain independant evaluation); 20 U.S.C. § 1415(f)(1)(A) (right to impartial due process hearing); 20 U.S.C. § 1414(e) (parents must be part of group making decisions on child's educational placement); 20 U.S.C. § 1414(d)(3)(A)(ii) (parents' concerns must be considered). To that end, a school district must conduct meaningful IEP meetings with the parents. *W.G. v. Bd. of Tr. of Target Range Sch. Dist.* ("*Target Range*"), 960 F.2d 1479, 1485 (9th Cir. 1992). Here, Father meaningfully participated at the October 9, 2006 IEP meeting. He contributed to the discussions of Student's abilities. He was also given the chance to raise his own concerns. Student fails to provide evidence of significant impediments to Parents' opportunity to participate. In addition, the Court agrees with the ALJ in finding no fatal procedural defects. (AR 298 ¶ 21.)

Therefore, Student's right to a FAPE have not been impeded, nor has she been deprived educational benefits, due to procedural defects.

B. Reasonably Calculated to Provide Educational Benefit

Under the IDEA, a school district must provide a "basic floor of opportunity" consisting of "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." *Rowley*, 458 U.S. at 201, 102 S. Ct. at 3048. The "basic floor of opportunity" does not require a school district to provide services which maximizes a child's potential. *Id.* at 198-99, 102 S. Ct. at 3046; *see also Gregory K.*, 811 F.2d at 1314 ("An 'appropriate' public education does not mean the absolutely best or 'potential-maximizing' education for the individual child."). The FAPE analysis

focuses on the adequacy of the school district's proposed program itself, even if the parents preferred another program which may have resulted in greater educational benefit. *Gregory K.*, 811 F.2d at 1314.

A FAPE consists of "specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability," 20 U.S.C. § 1401(29), with "related services" that "may be required to assist a child with a disability to benefit from special education," § 1401(26)(A). *See also* Cal. Educ. Code § 56031. The FAPE must also be provided under public supervision and direction; meet state educational standards; include appropriate preschool, elementary, or secondary school education; and comport with an IEP. 20 U.S.C. § 1401(9). In addition, the FAPE must be provided in the "least restrictive environment" to each special education student. 20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. 300.114(a). "To the maximum extent appropriate," special education students must be educated with students who are not disabled, and removal of special education students from the regular education environment "occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2)(i)-(ii).

At the October 9, 2006 IEP meeting, District offered an adequate FAPE, which was reasonably calculated to provide Student with an educational benefit. Student participated in regular education ninety-six percent of the time, and spent only four percent in a pull-out speech and language service away from regular education. (AR 298 ¶ 20.) Ms. McIver testified that regular education was inadequate in meeting Student's needs. Public supervision and appropriate elementary school education were provided. Student's unique education needs were clearly addressed. Parents' preference for an alternative program does not impede the finding of a FAPE. Therefore, District's FAPE met all the substantive requirements.

II. Whether District was Entitled to Conduct January 22, 2007 Reassessment Plan

A. Need for Reassessment

District's need to conduct a reassessment of Student was originally based upon the IEP team's decision to do so. At the October 9, 2006 meeting, both Ms. McIver and Father raised concerns about Student's subpar performance in school. Ms. McIver was particularly concerned that she was not able to properly address Student's needs in regular education, and she suggested a reassessment in order to better pinpoint those needs. The ALJ gave Ms. McIver's testimony considerable weight. (AR 284 ¶ 7.) Section 1414(a)(2) calls for a reevaluation if a school district or one of its teachers determines that one is warranted. *See also* Cal. Educ. Code § 56381(a). A school district must also reassess a student before removing her from special education, unless she reaches the age of twenty-two or graduates with a regular high school diploma. Cal. Educ. Code §§ 56381(h) & (I), 56026(c)(4)(A)-(C); 20 U.S.C. § 1414(c)(5). Here, Parents did not contest the need for reassessment as they hired Dr. Harjani-Muirhead for a private assessment in March of 2007. In addition, Ms. McIver's suggestion and Parents' exit request establish the need to reassess Student.

B. Proper Notice

District must also provide proper notice to Parents describing the proposed assessment and Parents' procedural rights. 20 U.S.C. § 1414(b)(1); Cal. Educ. Code § 56321(a). The proposed assessment, given in writing within fifteen days of the referral for assessment, must be in the parents' native tongue and easily understood by the general public, explain the proposed assessments, and state that no IEP will be implemented without the parents' consent. Cal. Educ. Code §§ 56321(b)(1)-(4); *see also* 20 U.S.C. 1415(c)(1). Student fails to meet her burden in contending that District failed to provide proper notice. She presents no evidence of any deficiencies in District's notice. District provided proper notice for the January 22, 2007

assessment plan (AR 971-74) as well as the October 2006 plan (AR 890).

C. Parental Consent

If a student wishes to receive benefits under the IDEA, the school district has the right to conduct assessments and reassessments. *Gregory K.*, 811 F.2d at 1315. The school district must obtain the parents' informed consent before conducting any assessments. 20 U.S.C. § 1414(c)(3). However, if the parents "refuse to allow their children to be evaluated," a school district may seek a due process hearing to override the consent requirement. *Schaffer*, 546 U.S. at 53, 126 S. Ct. at 532; 20 U.S.C. § 1415(b)(6)(A); Cal. Educ. Code § 56501(a)(3); 34 C.F.R. § 300.300(c)(1)(ii) ("If the parent refuses to consent to the reevaluation, the public agency may, but is not required to, pursue the reevaluation by using the consent override procedures described in paragraph (a)(3) of this section."); Cal. Educ. Code § 56381(f)(3) ("If the parent refuses to consent to the reassessment, the local educational agency may, but is not required to, pursue the reassessment by using the consent override procedures described in Section 300.300(a)(3) of Title 34 of the Code of Federal Regulations."); Cal. Educ. Code § 56506(e) ("Written parental consent pursuant to Section 56321 shall be obtained before any assessment of the pupil is conducted, unless the public agency prevails in a due process hearing relating to the assessment."). If the student clearly waived his or her IDEA rights by being home schooled or placed in a private school at the parents' expense, the school district does not have the right to conduct any assessments or use consent override procedures. 34 C.F.R. 300.300(d)(4)(I). If the parents refuse all special education services in an IEP after having consented to those services in the past, the school district must file a due process request. Cal. Educ. Code 56346(d).[2]

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[2] As noted in the ALJ's decision (AR 295 n. 11), the United States Department of Education recently considered whether parents should have the right to unilaterally withdraw a child from special education, but have not yet made any changes to the law. 71 Fed. Reg. 46633 (August 14, 2006).

Here, Parents first revoked, then later refused to give consent to District's reassessment. Parents also refused special education services after having consented to those services in the past. In response to Parents' refusal, District filed a proper request for due process with the OAH. This Court agrees with the ALJ that District is entitled to conduct the reassessment and it may override Parents' consent.

CONCLUSION

For the foregoing reasons, the Court hereby **AFFIRMS** the administrative decision.

IT IS SO ORDERED.

Dated: August 8, 2008

FLORENCE-MARIE COOPER, JUDGE
UNITED STATES DISTRICT COURT